

Ranking Member John Thune
Questions for the Record
Nomination of Ms. Terrell McSweeney to be
Commissioner, Federal Trade Commission
Senate Committee on Commerce, Science, and Transportation
Hearing on September 18, 2013

Big Data Privacy Enforcement

1. As the FTC continues to engage on privacy issues, Chairman Ramirez and commission staff have both identified “big data” as an enforcement priority. In a recent speech to the Technology Policy Institute, Chairman Ramirez stated her view that the Commission has the tools it needs to address privacy concerns. Specifically, under the FTC Act, the Commission is able to enforce against both deceptive claims and unfair commercial practices. Recent enforcement actions brought under FTC’s deceptive practices authority feature fact patterns where firms have violated their own privacy policies or other commitments to consumers to keep their data confidential. Defendants in such cases are aware both of the commitments they have made, and of their responsibility to honor those commitments. However, cases brought under the Commission’s unfairness authority appear less clear cut in terms of what is expected of marketplace actors. These actions, the vast majority of which have resulted in consent order agreements, have produced little in the way of analysis.

In your view, what would be the appropriate benchmarks for determining whether an activity regarding data security was unfair?

Answer

I believe the appropriate benchmarks for determining whether conduct involving personal data is unfair are those found in the Commission’s unfairness statement and codified in the 1990s by Congress. They are: whether the act or practice causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or competition. Enforcement decisions using this authority should be made based on evidence that these three elements are met.

2. Recently, Chairwoman Ramirez spoke about her vision on regulating Internet companies and issued a warning to companies that create products and services using data. She said: “Thou shall not collect and hold onto personal information unnecessary to an identified purpose. Keeping data on the off chance that it might prove useful is not consistent with privacy best practices.” However, both public institutions and private companies have been able to re-analyze previously collected data to realize important benefits for Americans -- for example, Internet companies learned how to filter email spam after realizing that emails marked as spam possessed distinctive patterns. And public institutions such as state departments of health have been able to better prioritize services using previously collected data. Retaining data while also respecting a user's privacy often makes government or industry more effective and efficient.

- a) **As a Commissioner, would you agree with the Chairwoman’s approach? Or do you feel such a blanket approach could act as a barrier to innovative products and services for consumers?**

Answer

If I am confirmed, I will discuss the question of how to approach unanticipated uses of data with all of the Commissioners. Without additional context, I do not believe it is appropriate for me to opine on the Chairwoman’s views on this issue. The FTC is primarily an enforcement agency. As such, the Commission should make enforcement decisions based on the standards of the FTC Act. In all matters, I believe each Commissioner should carefully review the evidence before determining whether a violation has occurred.

- b) **Would you commit to making sure that the FTC instead appropriately focuses its law enforcement efforts on the uses of data that cause real harms for consumers?**

Answer

I believe it is appropriate for the FTC to prioritize enforcement efforts around conduct that is either clearly harmful to consumers or deceptive or both. I believe that enforcers must carefully evaluate the evidence in each case. The appropriate benchmarks for determining whether a practice is deceptive are: that it is likely to mislead consumers acting reasonably under the circumstances and likely to affect consumers’ decisions regarding the product. In evaluating whether conduct involving personal data is unfair the Commission should adhere to Commission’s unfairness statement – which was also codified in the 1990s by Congress. The standard for unfairness is whether the act or practice causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or competition. I believe that these rigorous legal standards must be met in all enforcement actions.

Identity Theft

3. **Earlier this summer, the FTC released its Draft Strategic Plan for 2014-2018, recommending that the Commission “target [its] law enforcement efforts on violations that create the greatest amount of consumer harm,” and that its performance should be measured in part by the “percentage of the FTC’s consumer protection law enforcement actions that targeted the subject of consumer complaints to the FTC.” However, this has not been the case at the Commission in the past few years. Records indicate that the FTC has held four times as many round tables on the issue of privacy as the Commission has on data breach and identity theft, despite the fact that identity theft has been the #1 complaint filed with the FTC by taxpayers.**

Would you work to refocus the agency’s resources toward responding to this serious crime of identity theft that affects so many Americans, particularly the elderly and members of our military?

Answer

If I am confirmed, I will carefully review how FTC resources are currently directed toward identity theft and deceptive or fraudulent schemes that target groups like seniors, children, veterans, and the financially distressed. I agree that the FTC plays an important role in combating identity theft. The Commission should continue to work closely with other law enforcement partners, such as the Department of Justice and state attorneys general, to crack down on identity theft crimes and to assist victims in their recovery from it. I believe it is also important for the FTC to continue to play the important function of providing valuable education materials and resources which raise awareness regarding consumers' rights and provide guidance for those assisting victims of identity theft.

Fraudulent Schemes

4. According to the FTC's most recent survey of fraud in the U.S., during 2011, an estimated 10.8% of U.S. adults – 25.6 million people – were victims of one or more of the frauds surveyed. The three most common types of fraud, as measured by the number of incidents, were fraudulent weight-loss products (7.6 million incidents), fraudulent prize promotions (2.9 incidents), and fraudulent work-at-home programs (2.8 million incidents).

In your view, what more can the Commission do to prevent these types of scams? Do you believe the FTC's enforcement actions should mirror the most prevalent types of scams?

Answer

I understand that, particularly in the current budget environment, the FTC must prioritize the use of its resources. If I am confirmed, I look forward to conferring with the other Commissioners and to learning more about how these decisions are made. In setting areas of priority, I believe that the FTC should take into consideration the prevalence of types of scams, the amount of consumer harm from them, and also the emergence of new types of scams that may warrant a prompt and clear response. The high volume of complaints about these types of frauds also suggests how important it is for the FTC to partner with other law enforcement agencies, including the Department of Justice and state attorneys general, to combat these schemes.

Empirical Evidence

5. Do you believe that the Commission currently places enough emphasis on empirical evidence and economic theory in deciding whether to bring an enforcement action?

Answer

I am not privy to information that would allow me to adequately assess the FTC's current level of emphasis on empirical evidence and economic theory in making enforcement decisions. However, I believe empirical evidence and economic theory play a vital role in assessing harm to competition and consumers as well as potential efficiencies. In my experience, antitrust enforcement is most effective when it is analytically grounded, factually supported and consumer oriented.

When Should the FTC Bring a Case?

6. The Commission’s standard under the Federal Trade Commission Act for filing an initial complaint against a firm states that the Commission must have “reason to believe that a violation of the law has occurred” before it may file an initial complaint and may only do so if it would serve the public interest. Because neither the FTC Act nor the FTC’s rules define the “reason to believe” standard, the question of whether a complaint is appropriate is up to the discretion of each commissioner.

a) How would you decide whether this requirement has been satisfied?

Answer

Each Commissioner should consider the nature and strength of the available evidence in making a decision about whether the standard has been met. While certainty is not required, we must have reason to believe a violation has occurred.

b) What threshold must be met before the agency may proceed? Is it a low standard that litigation “may” lead to a finding of liability? Or should it be stronger?

Answer

If I am confirmed, I will carefully consult and follow the relevant case law describing when the reason to believe threshold has been met. I have not currently formed an opinion on whether the standard is too low.

c) In your view, is a more clearly-articulated standard needed?

Answer

I do not presently have a view on this question. If I am confirmed, I will review the relevant case law and confer with the commissioners regarding this question.

Section 5

7. As you know, Section 5 of the FTC Act provides the primary source of authority for the FTC’s antitrust and consumer protection missions. The language of this statute is broad, making unlawful “unfair methods of competition” and “unfair or deceptive acts or practices.” Chairman Liebowitz, whose seat you have been nominated to fill, openly argued that the Commission’s powers under Section 5 are expansive and reach a “broader array of behavior than the antitrust laws.”

a) In your view, what are the limits to the FTC’s powers under Section 5?

Answer

I believe the central tenets that should guide enforcement decisions are harm to competition and consumers. The Supreme Court has confirmed that Congress intended Section 5 to reach beyond the antitrust laws. Although the precise boundaries have never been squarely articulated, there is generally agreement that Section 5 covers some conduct which is outside the scope of the

Sherman and Clayton acts – such as invitations to collude or exchange of competitively sensitive information. Such practices must be anticompetitive in a meaningful sense. The relevant legal standards require antitrust enforcers to have factual support for a credible theory of economic harm to consumers in order to bring a case. I believe the FTC should only use its stand alone Section 5 authority judiciously and after thoroughly considering the evidence, and determining that the practices involved would prove harmful to competition and consumers.

- b) When would it be proper for the agency to file a complaint under its Section 5 authority?**

Answer

As noted above, the relevant legal standards require antitrust enforcers to have factual support for a credible theory of economic harm to consumers in order to bring a case. I believe the FTC should only use its stand alone Section 5 authority after thoroughly considering the evidence that the practices involved would prove harmful to competition and consumers.

- c) What types of FTC actions would constitute an overreach of the agency's authority in your view?**

Answer

The FTC should hew to the relevant legal standards in making any enforcement decision. I would consider actions that are not supported by evidence of actual or probable harm to competition and consumers an overreach of the agency's Section 5 unfair methods of competition authority.

Antitrust Enforcement in the Tech Sector

8. It is clear that technology markets pose unique challenges for antitrust regulators. Unlike other sectors of the economy that predominated in the prior centuries when our antitrust laws were written, the tech sector continues to spawn new business models that do not necessarily fit cleanly into the existing regulatory framework. Commissioner Wright has written, for instance, that empirical evaluation of business practices in high tech-markets is complex, in part because these cases involve conduct that can theoretically prove either pro-competitive or anti-competitive.

- a) Are antitrust regulators able to benefit consumers with a focus on traditional antitrust metrics (such as price and output) or is it time for a new approach?**

Answer

Innovation, especially at the fast pace it occurs in the technology sector, can pose challenges for antitrust enforcers who must fully understand market dynamics when assessing whether mergers or firm conduct are anticompetitive. However, this is not a new issue in antitrust law. Innovations are constantly transforming the economy. From the automobile, to radio, to telephone, to television, to computers, to mobile devices, technological advances have changed how people communicate, travel and conduct business. One of the great strengths of the antitrust laws is their flexibility – which allows enforcers and the courts to approach the central issue of

competition in different factual situations over time. Antitrust case law recognizes that competition is vital to innovation and requires enforcers and courts to apply a balanced, fact-based approach to law enforcement. I believe the common law approach of the United States antitrust laws is a strength of our system.

- b) Are there other areas of antitrust jurisprudence that you believe need to be more fully developed?**

Answer

In the past year the Supreme Court has clarified two important areas of antitrust law. In Phoebe Putney Health Services, Inc., a unanimous Supreme Court clarified that for the state action doctrine to apply the anticompetitive effect must be the “foreseeable result” of what is authorized by the state. In Actavis, the Supreme Court confirmed that traditional antitrust principles should apply in challenges to reverse-payment agreements. Both cases provide important clarifications of the scope of judicially created exemptions from competition law. I believe it will be important to watch carefully how these doctrines evolve in lower courts.

Foreign Acquisition of American Companies

9. Across a number of sectors we have seen instances where foreign companies—sometimes state-owned—seek to acquire American companies.

- a) Could you share your views about the past or present acquisition of American companies by foreign, state-owned companies?**

Answer

In antitrust law the ultimate ownership of the acquiring company only matters to the extent that it raises competition issues – for example, horizontal concerns may be present if the entity owns another competitor in the industry. In evaluating the impact of a transaction on competition, antitrust enforcers do not consider whether the buyer is domestic or foreign. I believe that is appropriate in order to promote an open global marketplace and that exporting this framework, particularly to countries that are developing antitrust laws, is important.

- c) Do you see any negative implications of these types of mergers and acquisitions on consumers or various elements of American industry?**

Answer

Yes, such acquisitions may raise many issues aside from their potential impacts on competition. For example, they may be subject to CFIUS review for potential national security issues and other issues that go beyond antitrust. However, it is important to have an open market for foreign investment – so each transaction should be evaluated on a case by case basis by the relevant enforcement agencies.